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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

TERM 1986

PATRICIA LOUISE STRANAHAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE COLORADO COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Whether inherently antagonistic and inconsistent verdicts are consistent with due process and this Court's recent pronouncement in *United States* v. *Powell, 469 U.S. _____, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984).*

IN THE

SUPREME COURT OF THE UNITED STATES

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PATRICIA LOUISE STRANAHAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE 10TH CIRCUIT COURT

Opinion Below

The opinion of the Tenth Circuit Court of Appeals is set forth in the Appendix, as is its Order denying Petition for Rehearing on February 25, 1986.

Grounds on Which the Jurisdiction of this Court is Invoked

28 U.S.C. § 1254: CERTIORARI JURISDICTION.

Constitutional Provisions and Statutes

"No person shall...be deprived of life, liberty, or property, without due process of law..." *United States Constitution Amendment V.*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, includes or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. 18 U.S.C. § 2.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy shall not exceed the maximum punishment provided for such misdemeanor. 18 U.S.C. § 371.

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means.

(1) to collect or attempt to collect any extension of credit, or shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity, or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(c) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or

controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States. 18 U.S.C. § 1952.

Statement of the Case

Doctor Patricia Louise Stranahan, a pathologist, became involved with another pathologist, Michael Roark, who she had met in medical school. The two of them entered into a partnership agreement for the practice of medicine in January 1982.

In July 1982, Dr. Roark was approached by a building contractor, Joe DeBrecini, seeking investment in the development of a medical research center. The center was to be known as Aspen Hill. Dr. Roark then in turn solicited petitioner, and her husband, Bruce Richardson, for investment.

Dr. Roark eventually decided against the investment. Dr. Stranahan, her husband, and DeBrecini proceeded, with Stranahan and Richardson obtaining a loan for $150,000.00, using as collateral certain farm land Richardson had inherited from his parents. Dr. Stranahan and Richardson then gave this money to Joe DeBrecini.

The Aspen Hill project collapsed shortly thereafter, Stranahan and Richardson ceased payment on the loan, and in November, 1983, the lender foreclosed on the Richardson farm.

Dr. Stranahan's relationship with Dr. Roark deteriorated in late 1982 when she realized that she was contributing more than half the labor, and receiving less than half of the profits from the practice. Roark disputed this. Stranahan and Richardson eventually took legal action against Roark and DeBrecini based on the abortive real estate deal, and financial discrepancies within the the medical partnership. The partnership was terminated in April 1983.

When discovery in the lawsuits revealed that Dr. Roark was essentially without assets, Dr. Stranahan sought to dismiss those actions as against Roark. Her husband twice refused to agree to the settlement terms.

Early in 1984, Robert Konitski placed an advertisement in the classified advertising section of *Soldier of Fortune.* magazine. That advertisement read:

> Recovery and collection, international agents guarantee results on any type of recovery. Reply to Delta Enterprises, P.O. Box 5241, Rockford Illinois 61125.

Thereafter, Konitski received a letter postmarked April 5, 1984, from Bruce Richardson. This letter requested Konitski's services in helping Richardson collect debts from "one man [who] owes me $150,000.00...[and another who] embezzled $185,000.00 from my wife." Richardson included his telephone number, and Konitski called that number and talked to Richardson several times.

On April 20, 1984, Konitski and some co-employees flew to Denver where they stayed for approximately ten days. All their expenses were paid for by Richardson. During this stay in Denver, they engaged in surveillance of Dr. Roark and DeBrecini.

While Konitski was in Denver, Bruce Richardson introduced him to Dr. Stranahan. Dr. Stranahan testified that Konitski was introduced to her only as "Rob", a friend of Richardson's family who was an investments expert from Chicago. Stranahan saw "Rob" a few times during this week, although never outside the presence of Richardson. Konitski held himself out to be an investment expert, with business contacts who where interested in allergy clinics such as the one Dr. Stranahan operated.

As far as Dr. Stranahan knew, "Rob" and the collection agency hired by her husband were completely unrelated; she never discussed collecting the Roark and DeBrecini debts with the man introduced to her as "Rob". This was disputed by Konitski, who claimed that both Dr. Stranahan and Richardson knew and approved of the collection methods he intended to use "That the gentlemen had to be picked up and forced to sign documents and then turned loose."

No efforts at collection were made in Denver. At some time before April 30th, Dr. Roark left Denver for Buffalo, New York, where he had found a job. Konitski, and his cohorts followed, bringing with them no fewer than eight weapons, including an Uzi submachine gun and a riot shotgun. Richardson joined them. These men eventually located Dr. Roark, who

was staying at a small motor lodge on the outskirts of town. Konitski's men kidnapped Roark, pushing him into a van, handcuffing and blindfolding him. Threats where then made towards Roark's person and family, and documents were produced for Roark's "signature": two blank Deeds of Trust, and a Promissory Note in the amount of $260 or $280,000.00. Dr. Roark signed.

After signing where directed to, Dr. Roark was taken back to his motel. He was instructed that if he called the police his entire family would be killed. Nevertheles, Dr. Roark did contact the local police department, who in turn contacted the FBI.

Petitioner was indicted on 3 counts: collection by extortion in violation of 18 U.S.C. §§ 2 and 894, using interstate travel in aid of racketeering and aiding and abetting such travel in violation of 18 U.S.C. §§ 2 and 1952, and conspiring to use interstate travel to aid racketerring . 18 U.S.C. §§ 371 and 1952. The jury acquitted petitioner of count 2, of using interstate travel and aiding and abetting such travel, but nevertheless convicted on counts 1 and 2.

The Tenth Circuit Court of Appeals affirmed. In affirming, the Court of Appeals held that the disparate elements of conspirarcy and aiding and abetting creates a distinction between the two offenses. In the alternative, the Court of Appeals held that the inconsistent verdicts did not require reversal pursuant to this Honorable Court's decision in *United States v. Powell*, 469 U.S. ____, 105 S.CT. 471, 83 L.Ed.2d 461 (1984). Certiorari is sought to seek a determination by this Honorable Court as to the propriety of this ruling. *See United States v. Powell, supra;* and *Dunn v. United States*, 284 U.S. 390, 52 S.Ct. 189, 26 L.Ed. 356 (1932).

Argument

Powell and Dunn Do Not Support Affirmance of a Conviction Where the Acquittal is for Aiding and Abetting and Conviction is for Conspiracy

At trial, the jury entered verdicts of acquittal for use of interstate travel and aid of racketeering and for aiding and abetting the use of interstate of travel in aid of racketeering. Despite this, the jury entered judgments of conviction for extortionate collection and conspiracy to travel interstate in aid of racketeering. Those verdicts are inherently antagonistic and inconsistent, requiring reversal.

Historically, this Honorable Court has held that verdict consistency is not necessary. *Dunn v. United States, supra.* This is so even where logical consistency might put the conviction in question. *United States v. Powell, supra.*

Both *Dunn* and *Powell,* and the Circuit court decisions overruled in *Powell,* involved true "predicate offenses", such as conspiracy of facilitation. *See, e.g., United States v. Hannah.* 584 F. 2d 27 (3d Cir. 1978). None of these cases involve the unique relationship between complicity and conspiracy. The failure to observe this critical distinction will create an atmosphere rife for inconsistent verdicts of conviction which negate guilt beyond reasonable doubt, violative of due process.

In order to acquit petitioner on Count 2, aiding and abetting the use of interstate travel in aid of racketeering, the jury must have found the evidence insufficient to show that petitioner willfully participated in the commission of a violation of the Travel Act, 18 U.S.C. § 1952, or that she aided, abetted, counseled, commanded, induced or procured the commission of such crime. Here, in light of clear evidence that every actual participant in the scheme indeed travelled in interstate commerce, such complicity on her part should have been established beyond a reasonable doubt *had* the jury actually believed she was involved in the scheme to begin with.

Nevetheless, the same jury would have had to have found that the defendant did willfully participate in an unlawful plan with the intent to advance or further some object or purpose of

the conspiracy either through knowingly encouraging, advising, or assisting with the purpose of furthering the scheme, in order to convict on Count 3. These verdicts are inherently inconsistent and antagonistic.

If is difficult to imagine how the evidence could be insufficient to show that the defendent willingly participated in the commission of the offense yet sufficient to show that petitioner willfully participated in the unlawful plan. Likewise, it is impossible to explain how, when the evidence was insufficient to who that plaintiff aided, abetted, counseled, commanded, induced or procured the commission of the offense, that same evidence was adequate to demonstrate that Dr. Stranahan knowingly encouraged, advised or assisted for the purpose of furthering the undertaking with an understanding of the unlawful character of the plan.

Verdict inconsistency warrants reversal whenever the acquittal negates the existence of an essential element of the crime for which the defendant was convicted. *United States v. Bethea*. 483 F.2d 1024 (4th Cir. 1973). An essential element of conspiracy is that the defendant willfully associated: *United States v. Netterville*, 553 F.2d 903 (5th Cir. 1977). Willful participation here was negated by the jury's verdict of acquittal on the second count, where knowing participation was an essential element. Petitioner's conspiracy conviction must therefore be reversed due to the jury's implicit findings that negated an essential element of conspiracy.

Here, elimination of the evidence upon which the acquittal was based renders the remaining evidence insufficient to support conviction on the reminaing charges. *Speiller v. United States*, 31 F.2d 682 (3d Cir. 1929); *United States v. Moloney*, 200 F.2d 344 (7th Cir. 1952). The evidence here was identical as to all three counts, leaving no independent evidence upon which a conspiracy could be found. This same evidence relied upon to establish the conspiracy is that which proved insufficient to establish the aiding and abetting of the substantive offense.

This is not a case such as *Dunn* or *Powell* where there is merely an inconsistent verdict, based on a true "predicate offense". Rather, here acquittal on complicity makes clear that the jury either did not believe the petitioner was involved in the undertaking, or was confused and reached verdicts of convic-

tion without truly understanding why they were doing so. Under these circumstances, due process was denied.

Petitioner is not seeking to carve out a new exception to the rule enunciated in *Powell* and *Dunn*. This Honorable Court has made clear in *Powell* its disinclination to consider exceptions to the *Dunn* rule. However, where, as here, the inconsistency puts in grave question the propriety of the jury's deliberations reversal is appropriate.

The verdict here is repugnant. *See Dunn v. United States, supra* (Judge Butler, dissenting). Its inherent internal inconsistency makes clear that something other than reasoned deliberation resulted in the verdict rendered. Petitioner prays that this Honorable Court will issue its writ of certiorari to reverse her conviction.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Number 84-2499

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

PATRICIA LOUISE STRANAHAN,
Defendant-Appellant.

ORDER AND JUDGMENT

Before McKAY and SETH, Circuit Judges, and GREENE, District Judge.*

This case arose out of appellant's involvement in the abduction of Dr. Michael Roark. The governments evidence showed that appellant's husband hired Mr. Robert Konitski to extort monies from Dr. Roark, appellant's former business associate. Mr. Konitski testified that appellant met with him to discuss his collection methods and that he told appellant that Dr. Roark would have to be "picked up and forced to sign documents and then turned loose." Record, vol. 4, at 194-95. Appellant prepared a tape recording for Mr. Konitski on which she provided detailed information about Dr. Roark and his family, including the occupations and whereabouts of his parents, brother, and in-laws. Appellant also provided information on the tape recording about Mr. Joe DeBrecini, Dr. Roark's friend and business associate who was also an object of the extortion scheme. Pursuant to the extortion plan, Mr. Konitski and his associates kidnapped Dr. Roark. After he was released, Dr. Roark called appellant on the telephone and asked her why she had arranged to have him kidnapped. During that conversation, she taunted him with the remark, "It's an interesting game, isn't it?" Record, vol. 3, Exhibit 60A, at 25.

Appellant was convicted by a jury of knowingly and willfully participating in the use of extorionate means to attempt to collect a debt, in violationos 18 U.S.C. §§ 2 and 894 (1982) (count one); and knowingly and willfully conspiring to travel in interstate commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. § 371 (1982) (count three). The jury returned a verdict of not guilty on count two, which charged appellant with aiding and abetting interstate travel in aid of a racketeering enterprise, in violation of 18 U.S.C. §§ 2 and 1952 (1982).

I.

Appellant first contends that the evidence is insufficient to sustain the jury's verdict on counts one and three of the indictment. She argues that her conviction should be reversed because the evidence presented was consistent with both innocence and guilt. However, the government is not required to present evidence which excludes every reasonable hypothesis of innocence. *Jackson v. Virginia,* 443 U.S. 307, 326 (1979); *Corbin v. United States,* 253 F.2d 646, 649 (10 Cr. 1958).

In evaluating the sufficiency of the evidence, we must view the evidence—both direct and circumstantial, together with all

reasonable inferences to be drawn therefrom—in the light most favorable to the government. *Glasser v. United States,* 315 U.S. 60, 80 (1942); *United States v. White,* 673 F.2d 299, 301-02 (10th Cir. 1982). The evidence is sufficent if, when viewed in this light, it supports "any rational determination of guilty beyond a reasonable doubt." *United States v. Powell,* 105 S. Ct. 471, 478 (1984); *Jackson v. Virginia,* 443 U.S. at 319; *Glasser v. United States,* 316 U.S. at 80.

Under 18 U.S.C. § 2 (2) (1982), "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Thus, the government was not required to prove that appellant personally threatened Dr. Roark. *See United States v. Boley,* 730 F.2d 1326, 1332 (10th Cir. 1984). On the basis of the record, we conclude that the evidence is more than sufficient to support the jury's verdict of guilty on count one of the indictment.

With regard to count three, appellant argues that the evidence does not establish that she had knowledge of the conspiracy. An agreement between conspirator may be express or implied. *United States v. Lopez,* 576, F.2d 840, 843-44 (10th Cir. 1978). The prosecution introduced sufficient circumstantial evidence to establish that appellant tacitly agreed to assist in carrying out the extortion scheme. The evidence clearly supports the jury's verdict on count three of the indictment.

II.

Appellant next contends that the jury's verdicts are inconsistent because the jury acquitted her of aiding and abetting interstate travel in aid of racketeering but convicted her of conspiracy to commit the same offense. Appellant's argument fails to recognize that the offenses of conspiracy and aiding and abetting are distinct. *Goldsmith v. Chaney,* 447 F.2d 624, 628 (10th Cir. 1971). Moreover, the associational aspects of conspiracy make it distinct from the predicate offense. *United States v. Nickerson,* 606 F.2d 156, 159 (6th Ric.), *cert. denied.* 444 U.S. 994 (1979). Even if the offenses were not distinct, inconsistency in the verdicts would not require reversal. Where the jury acquits the defendant of the predicate offense and con-

victs the defendant of the compound offense, the test is directed to the sufficiency of the evidence to supprt the conviction—not whether the jury's action on the two counts can be harmonized. A variety of acceptable considerations, including leniency, can explain the apparent inconsistency in the verdicts. *United States v. Powell,* 105 S. Ct. 471, 477 (1984). As noted above, there is sufficient evidence to support the jury's verdict of guilty on count three. Thus, we affirm on this issue.

III.

Appellant finally contends that the trial court erred in admitting into evidence an excerpt from the tape recording she prepared for Mr. Konitski to assist him in extorting monies from Dr. Roark and Mr. DeBrecini. Concerning Mr. DeBrecini, appellant states "[O]ne thing that we know for certain is that Joe DeBrecini is scared to death of water. Also, he worships the ground that his wife walks on so those are probably his two most vulnerable areas." Record, vol. 3, Exhibit 48. Appellant characterizes this statement as evidence of "uncharged crimes" and argues that Rule 404(b) of the Federal Rules of Evidence renders such evidence inadmissible.* She also contends that the evidence should have been excluded under Rule 403, which calls for the exclusion of evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

The trial court did not err by admitting the tape recorded excerpt. Although appellant's statement concerning Mr. DeBrecini might be evidence of another crime, it is probative of her preparation and plan to extort monies from Dr. Roark. It is obvious from the record, and the trial court observed, that the evidence is "part of the entire arrangement" and establishes "an integral relationship of the parties." Record, vol. 4, at 170. Thus the evidence was admissible under Fed. R. Evid. 404(b).

The evidence was also admissible under Fed. R. Evid. 403. It thwarts appellant's contention that she did not know that extortionate means would be used by Mr. Konitski and his cohorts. Although the evidence might have been prejudicial in the sense that it was damaging to appellant's defense, the record

shows that the trial court considered the danger of unfair prejudice and concluded that it did not substantially outweigh the probative value of the evidence. The trial court has broad discretion in striking the balance between probative value and prejudice. *See United States v. Carleo,* 576 F.2d 846,849 (10th Cir.), *Cert denied,* 439 US.S. 850 (1978). The trial court's decision to admit the excerpt of the tape recording was not an abuse of discretion.

AFFIRMED.

HOWARD K. PHILLIPS, Clerk

*Rule 404(b) of the Federal Rules of Evidence provides as follows:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Case Number 84-2499

Before Honorable Monroe G. McKay, Honorable Oliver Seth, Circuit Judges Honorable J. Thomas, Greene, District Judge*

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

PATRICIA LOUISE STRANAHAN,
Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

HOWARD K. PHILLIPS, Clerk

*of the United States District Court for the District of Utah, sitting by designation.